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IN THE

Supreme Court of the United States

No. 195 OCTOBER TERM, 1950

JAMES RUTKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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Statement of the Case

Petitioner was convicted by a jury in the United States District Court for the District of New Jersey, upon an indictment containing one count which charged that petitioner willfully and knowingly attempted to defeat and evade income and victory taxes for the calendar year 1943, by filing a tax return which failed to include as income the sum of $250,000.00, which was received by petitioner under circumstances hereafter related. The indictment is founded on Section 145 (b) of the "Internal Revenue Code" (26 U. S. C. 1946 Ed.).

Upon appeal the conviction was affirmed, in a divided opinion, by the United States Court of Appeals for the Third Circuit. Application for rehearing was denied. Petitioner's application to this Court for certiorari to review the decision of the Court of Appeals was granted, and the case is now in this Court for decision.

Statute Involved

26 U. S. C. A. 145 (b)

"Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall * * * be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Is money secured by extortion taxable income within the meaning of 26 U. S. C. 22 (a)?

2. Is money secured by extortion taxable income within the meaning of 26 U. S. C. 22 (a) because the extortioner asserts a patently spurious claim thereto?

3. Did the trial court err in refusing to grant a motion to direct a judgment of acquittal made at the conclusion of the government's direct case?

4. May a Court of Appeals properly affirm a conviction upon a new finding of fact, when the trial jury was entirely uninstructed on the law to be applied to such finding?

5. Did the trial court commit reversible error in charging the jury incorrectly in a specific instruction on a vital issue, and in refusing petitioner's request to give the jury a lucid statement of the relevant legal criteria on that same issue?

6. Did the trial court properly charge the "false in one, false in all," maxim?

7. Did the trial court's charge erroneously impair the petitioner's testimony?

8. Did the trial court err in impugning the testimony of important witnesses for the defense?

9. Was the charge of the trial court argumentative and one-sided?

Preliminary Statement

Petitioner and one Joseph Reinfeld had been engaged as partners, with others, in the illegal liquor traffic during the Prohibition Era. Among the other partners were two men named Zwillman and Stacher (R12, R13, R19).*

In 1933, a wholesale liquor company known as Browne-Vintners was formed and licensed in New York. The illicit combine was liquidated and its treasury became the original invested capital of Browne-Vintners (R24). To conceal the tainted source of this capital as well as the names of the true owners of the capital stock of Browne-Vintners, Reinfeld resorted to several devices. For example, he caused a large part of the capital stock of Browne-Vintners to be held in the names of nominees, with the real stockholders neither appearing of record, nor holding any evidence of their interest in the company (R91, R92).

In 1940 the capital stock of Browne-Vintners was sold with a large resulting profit to stockholders. The nominees paid the capital gains tax due on these profits. In 1940 a capital gains tax was payable at a flat fixed rate without regard to the ordinary income tax bracket of the recipient of the gain. After payment of the capital gains tax Reinfeld paid the balance remaining to the true stockholders. The Government concedes that the tax due on these profits from the various true stockholders was paid by the nominees (R93). It was because the tax had already been paid on the profits of the Browne-Vintners sale that the Government conceded and the trial Jury was charged, that if the petitioner received the $250,000.00 payment in settlement of a bona fide claim of stock ownership in Browne-Vintners, the $250,000.00 would not be taxable to him and the jury would then be obliged to acquit (R932).

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* Refers to pages of printed Record on Appeal.

In the latter part of 1942 Zwillman and Stacher claimed that Reinfeld had withheld from them part of the true sum due them as their derivative share of the proceeds of the Browne-Vintners stock. Several meetings were held which were attended by Reinfeld, Zwillman, Stacher and the petitioner. Some of these meetings were also attended by accountants and counsel. At the last of these meetings, Reinfeld agreed to pay Zwillman and Stacher $358,000.00 and to pay petitioner $250,000.00 (R45, R46, R48). On May 11, 1943, the money, totalling $608,000.00, was paid in cash at the office of one of the attorneys in the presence of the three payees and three attorneys. A General Release, prepared by Reinfeld's attorney, was signed jointly by Zwillman, Stacher and the petitioner. The Browne-Vintners Company was one of the several releasees mentioned in this instrument (R966,[1] R970). Neither at the time of the payment, nor at any other time, did Reinfeld deliver to Rutkin a general release, or any other type of release with respect to the $250,000.00 which Reinfeld paid to Rutkin on May 11, 1943.

In 1948, petitioner instituted a civil suit against Reinfeld in New York seeking accounting and damages in the amount of $22,000,000.00. One of the essential bases of this suit was petitioner's alleged interest in Browne-Vintners. In the course of a pre-trial deposition taken in 1949, Reinfeld said, for the first time, that petitioner had never had any interest whatsoever in Browne-Vintners. Reinfeld explained the payment of the aforesaid $250,000.00 by saying that the petitioner had extorted this money from him by threats to kill Reinfeld and his family unless he was paid a large sum of money (R49, R321, R322).

These statements by Reinfeld led to the instant indictment of the petitioner, almost seven years after the pay-

[1] Exhibit D-8, the general release covering payments made to Zwillman, Stacher, and Rutkin, is set forth in full at page R966 of the Appendix to Petitioner's Brief in the Court of Appeals.

ment of the $250,000.00. Zwillman and Stacher were not indicted because the Government relied upon Reinfeld's affidavit that Zwillman and Stacher had received $358,000.00 as a further distributive share of the proceeds of the Browne-Vintners stock and since all the tax on the proceeds of the sale of that stock had been paid, no further tax was due thereon from any person having a bona fide claim to stock ownership in Browne-Vintners.

Petitioner always admitted the receipt of the $250,000.00 but claimed throughout the trial that the $250,000.00 was paid to him as his additional distributive share of the tax-paid proceeds of the sale of the Browne-Vintners stock, just as the $358,000.00 was paid to Zwillman and Stacher (R932). On the other hand, the Government contended throughout the trial that in 1943 petitioner had no claim whatsoever in the proceeds of the sale of the Browne-Vintners stock; that his assertion of such claim was to his knowledge without any basis in fact, and that such demands or claims as he made upon Reinfeld were spurious; and that petitioner extorted the $250,000.00 from Reinfeld by threats to kill Reinfeld or his family if the money was not paid (R40, R41, R321, R322).[2] The case went to the jury under instructions by the trial Court that if they believed the contention of the Government beyond a reasonable doubt, the $250,000.00 was taxable income and they could convict the petitioner; that if the jury believed that the petitioner had received the money without the use of threats in settlement of a bona fide claim of right to some stock ownership in Browne-Vintners, the $250,000.00 was not taxable and the petitioner should be acquitted (R930, R932).

[2] Brief of Government in the Court of Appeals, at page 13, that:

> "The $250,000.00 did not in any way represent a claim which the appellant had with reference to Browne-Vintners. The $250,000.00 was given by Reinfeld to the appellant because of the course of conduct in which the appellant had threatened to kill Reinfeld if he did not give him first $100,000.00, then $200,000.00, then up to $500,000.00 and finally $250,000.00."

Statement of the Evidence

Starting in 1926, Reinfeld was engaged in two liquor ventures. One, conducted in the name of a company called P. R. Chartier, consisted of the purchase and sale of liquor on the islands of St. Pierre and Miquelon in the Bay of St. Lawrence. Reinfeld had a 17½% interest in that company (R12, R71). The other activity which he referred to as the "high seas venture" consisted of selling liquor from boats which remained beyond the twelve mile limit (R12, R13). Both ventures continued until 1932.

Reinfeld had a number of partners in the high seas venture, namely, Kanengiser, Facher, Schneider, Lentz and Hendler, erroneously called "Handler" (R13, R64). In fact, there were other partners, consisteing of his brothers, a brother-in-law named Holtz and others. One group was known as the Kanengiser group and the other as the Reinfeld group (R20).

Rutkin also was engaged in the liquor business. He and Reinfeld had known each other since 1923 (R12). In 1926 Rutkin joined Reinfeld's group (R14). Reinfeld said that Kanengiser brought Rutkin in, an act which Kanengiser attributed to Reinfeld (R14, R342). Reinfeld testified that Rutkin did not put any money into the enterprise and that he was accepted because he and his group were afraid they would encounter trouble and interference from Rutkin (R14). Examination disclosed, however, that the claimed fear was not engendered by anything that Rutkin either said or did (R16, R17). It was Rutkin's evidence that he paid $60,000.00 into the partnership (R635, R636). Rutkin's interest was increased when Hendler retired and Rutkin acquired his share (R18).

In 1930, others, known as the Seaman-Davis group, joined the enterprise and received a 50% interest (R19).

That group consisted of Seaman, Joseph Davis, Harry Davis, Zwillman, Stacher and four or five others. The Reinfeld-Kanengiser groups then had 50% of the partnership and the Seaman-Davis group had the remaining 50% (R20, R21). The enterprise was terminated in 1933 at which time Reinfeld concedes Rutkin had 6% of the total venture, or 12% of the Reinfeld-Kanengiser interest (R21, R22). Liquidation did not result in distribution of the assets. There was an accounting, both percentage-wise and dollar-wise rendered to each individual member of the partnership by Kanengiser, who prepared the accounting and submitted the same to the partners (R21, R22, R23). Only a small portion of the assets was distributed and the balance was retained for investment in the Browne-Vintners Company, which was organized in October 1943 (R21, R24, R25). Preparations for the organization and operation of such a company, which was to engage in the wholesale liquor business, were begun in 1932 when it appeared that prohibition was coming to an end. Reinfeld, Rutkin, Seaman and Holtz went to Europe in that year at the expense of the partnership for the purpose of securing agencies for foreign liquors to be sold by the company to be formed (R97, R100, R418). Browne-Vintners subsequently acquired some of the agencies (R101).

When the Browne-Vintners Company was formed, the partners were unwilling to disclose their interest in the company and for that reason the initial capital was sent to Canada to a man named Bower, who in turn returned the money to the United States and subscribed for stock of the company. The stock was issued in his name and was held by him for the partners, who were the beneficial owners (R25). Later this stock was transferred to and reissued in the names of Reinfeld's son-in-law, Norman Levin, and the latter's sisters (R111, R112). The authorized capital of the company was later increased and

stock for more than $2,000,000 was eventually issued. Of this, about $700,000. was issued in the name of nominees and the balance was held in the names of the actual stockholders (R28). It is not clear from the testimony, nor could Reinfeld say, which of the nominees held stock for particular beneficial stockholders. One White was a nominee (R115). Reinfeld was unable to say who was the real owner (R117). Silverman and Rubin, relatives of Reinfeld, were also nominees and Reinfeld could not identify the real owners (R120, R119). Newman was a nominee for $200,000. of stock (R558). Reinfeld, who owned stock in his own name, also was a nominee and did not know the names of the beneficial owners (R123). Cohen and Reinfeld arranged to have stock placed in the names of nominees for the real stockholders and it was Cohen who attended to the financial arrangements of the company and among the stockholders (R116, R123).

The situation was quite confused. For example, when Reinfeld was asked whether Levin was acting as "front man" when he acquired Bower's stock and for whom he was so acting, Reinfeld said, "Well, you couldn't just say for whom because the stock was not split up. There were stockholders and there were some stockholders through nominees and later on there were more nominees" (R111). In any event, it is undisputed that those who had an interest in the money that was originally sent to Bower retained their interest until the company was sold in 1940 (R113).

Reinfeld said that the undistributed assets of the partnership amounted to $250,000. and that it was this sum that was sent to Bower when the company was formed (R24). Kanengiser, who, according to Reinfeld, was in possession of the funds immediately before they were sent to Canada, and who was the one who advised the members

of their interest upon termination of the partnership, testified that the amount on hand and with which Browne-Vintners was formed was $469,000. and not $250,000. (R24, R345, R351). He said that an additional $31,000. was contributed by the partners at the inception of the company so that the starting capital was $500,000. (R348, R351, R355). Facher, who was one of the cashiers of the group, corroborated this (R417, R418, R429). A statement prepared by Cohen and which was marked D-9 in evidence also corroborates this (R968, R969). It is interesting to note that the Government did not produce the Browne-Vintners books to prove the initial capitalization of the company, nor did Levin who, with his sisters, received Bower's stock, testify in this case.

Reinfeld testified that Rutkin was not entitled to any share of the proceeds after the accounting since he was overdrawn $35,000. and that he had been so informed by Kanengiser (R22). Reinfeld therefore concluded that Rutkin had no financial interest in the initial stock which was purchased with the proceeds remaining in the partnership. Reinfeld so testified, although he did say that Rutkin had a 6% interest in the entire venture at the time the accounting was rendered (R21, R22). Kanengiser, who had prepared the accounting, testified that there was an open item of $35,000. when the partnership came to an end, consisting of expenses incurred by Rutkin and accounts receivable which Rutkin was unable to collect, that these items were discussed with Reinfeld and his family and other partners, with the result that Reinfeld and the others agreed to forgive this amount (R367, R368, R381). Thus, Rutkin was credited with a share of the moneys that went to form the initial capital of Browne-Vintners (R382).

In further contradiction of Reinfeld's denial that Rutkin had an interest in the company, Kanengiser testified that

he received from Cohen Exhibit D-9 and that he thereupon gave it to Rutkin (R343). Kanengiser had a 4% interest in the partnership amounting at the end to $18,773.74. He was asked to put up an additional $1,226. so that there would be an initial capital of $500,000. to start the company (R347, R348). He was not clear when he received the statement, at one time saying that it was in 1934 or 1935 (R349) and at another time that it was in 1937 or 1939 (R344). Rutkin said that he received it some time between 1934 and 1936 (R686). That exhibit was prepared by Cohen apparently when the capital was raised to $1,000,000. It shows (see upper left hand corner) that the original capital was $469,343.40. It also shows (see Jim R. on middle left side of exhibit) that Rutkin had a 6% interest in the original $469,343.40 and that to retain the same percentage in the new capital of $1,000,000., he was to pay to Reinfeld, who was to collect the same, the sum of $31,839.39, making his total interest at that time $60,000. The writing appearing in the lower right corner of the exhibit, showing percentage interests of the members of the Reinfeld group in $500,000. (one-half of $1,000,000.), is in Kanengiser's hand and was set down at Cohen's request (R360).

Exhibit D-9 shows that Kanengiser (K.) and Facher (J. F.) each had a $20,000. interest in the company. Both of them testified they had such an interest (R347, R421). Facher had increased his interest at Reinfeld's request (R420).

Reinfeld had maintained in his direct testimony that Rutkin's interest terminated when the partnership ended because he was overdrawn the $35,000. above referred to. He had testified that he and Kanengiser had absorbed Rutkin's interest (R95), a statement which Kanengiser denied (R370). Then, on cross-examination, Reinfeld was confronted with a form of assignment which Rutkin

had signed in 1936. He thereupon said that in 1936 Rutkin claimed that he had a 6% interest and was entitled to $60,000. and that after several months of disputes, he decided to recognize the claim, paid the money and took the assignment in the presence of Cohen (R175). Rutkin required the money for investment in a Florida hotel which he was going to operate in partnership with Jack Dempsey. Reinfeld denied that he had any financial interest in the hotel although he stopped there (R151). He said that of the $60,000., he gave a check for $15,000. or $20,000. and the balance in cash (R153). No such check was produced.

Rutkin, on the other hand, said that he and Reinfeld were partners in the venture with Dempsey (R674); that he was given not $60,000. but $120,000., one-half of which was Reinfeld's share and the other half of which Reinfeld loaned to him and that all of it was in cash (R674, R675). Cohen handed him the form of assignment which Rutkin thought was a receipt for the loan and then gave the entire sum in cash to him (R676, R677). As evidence of Reinfeld's interest in the venture, Rutkin testified that Cohen came to Florida at Reinfeld's request and set up the books of the company (R678, R679). The proposition was a losing one and Rutkin sold out his and Reinfeld's interest with Reinfeld's consent, after a year's operation (R679, R680). That interest was purchased by one Gaines for $60,000., cash on hand of $20,000. not forming a part of the transaction (R310, R311, R681). Of the $80,000. thus received by Rutkin, $40,000. was repaid to Reinfeld (R681). Reinfeld denied that he held any interest or paid more than the $60,000.

In support of Rutkin's testimony, Dempsey testified that he met Reinfeld before the Florida transaction and that Reinfeld told him he would be responsible for any debts or liabilities incurred by the hotel. The finances at the hotel were handled by Cohen, Reinfeld's accountant,

who was there part of the time and who had come down to set up the books and the financial structure (R324, R325, R326). Gaines, who purchased the interest, said Rutkin introduced Reinfeld to him as his partner, that he had offered to purchase the interest and that at a meeting held at the office of Browne-Vintners, Rutkin explained Gaines' proposal to Reinfeld whereupon Reinfeld instructed Rutkin to go ahead with the sale, saying that if it was all right with Rutkin, it was all right with him (R309 to R311).

Throughout the life of Browne-Vintners Company prior to its sale, Rutkin frequently was at its offices. Mrs. Thum, who was chief receptionist from 1934 to 1942, said that Rutkin came to the company's offices two or three times a week at times, although sometimes he was not there for many months (R515). Rutkin used all available offices that were not occupied by other people (R516). Pokrass, who was a large purchaser of liquors from the company, often saw Rutkin using many of the company offices on various occasions (R546). Bennett, who was with the company from February 1937 until March 1941, as national sales director, and then as vice-president, saw him at the company's offices and said that Rutkin did promotion work for the company (R336, R337, R339, R340). Some time in 1937, Reinfeld said that Rutkin was his partner (R337, R338). Joseph Davis, an original partner and secretary of the company, said that there were times when Rutkin would be around the offices every day and at other times he would not be there for a while (R454). Rutkin had the general use of the offices (R455).

The Sale of Browne-Vintners Company

In the latter part of 1940 Reinfeld received an offer for the stock of the company. The price offered was $7,500,000. net (R131). He said that he discussed the offer with Zwillman, Stacher, Harry and Joseph Davis, Cohen, Newman and White (R131), (although, as we have shown,

Newman and White were only nominees and owned no stock). He said that the meeting was held at the company's office and that he did not discuss the offer with them at any other place (R131). Then he said that he came to Newark to discuss the offer with Zwillman and Stacher, who did not come to the company's office (R132). At that meeting he told of the offer and asked the group whether they desired to sell, whereupon he was told that they did (R133). On cross examination his attention was called to a meeting held at the Park Central Hotel in New York. He acknowledged that such a meeting was held. He said that there were present Joseph and Harry Davis, Zwillman and Stacher but that Rutkin was not there (R133). It was at this meeting that the proposal of sale was made (R134).

Rutkin testified that he was present at the hotel meeting and that the consents of all present, including his, to the sale was requested by Reinfeld and given (R682 to R684). Joseph and Harry Davis corroborated that testimony. Harry Davis maintained an apartment for business purposes at the Park Central Hotel (R499). He said that a meeting was held at that apartment and that present were Reinfeld, Rutkin, Zwillman, Stacher, his brother and himself (R500). He said that Reinfeld spoke of the offer and recommended its acceptance. Reinfeld then asked each member present separately whether they wanted to sell and each one indicated that he did (R500). The sale resulted in Davis' receiving about $90,000 for his investment of $31,000 (R507). Joseph Davis testified that a meeting was held at his brother's apartment at the Park Central Hotel and that it was Rutkin who asked him to attend that meeting (R439). He corroborated his brother's and Rutkin's testimony that Zwillman, Stacher, Reinfeld, Rutkin and he and his brother were present (R439). Reinfeld spoke of the offer and then asked each one present individually, including Rutkin, whether he wanted to sell (R440). After the consents were given, the company was sold for $7,500,000. (R27, R440).

The testimony given by the Davis brothers was of extreme importance, since it demonstrated that in 1940, Rutkin had a financial interest in the company and that his consent to the sale was required. This was in opposition to Reinfeld's contradictory testimony that Rutkin never had an interest in the company and that if he did, it had been sold in 1936. It was unfortunate, therefore, and hurtful to the defendant that the Court stated in the presence of the jury, when an objection was made to an improper question, that it was not impressed by either Harry Davis or his brother. When an exception was taken to such remark, the Court said that he was stating his opinion of the witness (R503, R504).

The Payment of Income Taxes on the Proceeds of Sale

In addition to arranging for nominees, Cohen himself acted as a nominee (R123, R199). When the stock was sold, Cohen went to the other nominees and received from them the proceeds of sale less the amount which they had paid for income taxes (R205). For example, Newman, who owned no stock, but acted as nominee for stock which brought more than $200,000., said that the proceeds were deposited in his bank account and that he eventually paid the proceeds to Reinfeld and Levin in cash at different times (R558). Newman did not deposit the check personally. Cohen took the bank book and check, made the deposit and over a period of about six months the cash was withdrawn (R562, R563). An income tax was paid on it (R558). About $6,600,000. was distributed to stockholders and approximately $900,000. was held in reserve in a contingency fund (R126, R127). Reinfeld personally received in the neighborhood of $1,400,000. and the members of his family received another $1,000,000. (R126). The capital gains tax was paid on all of the stock of the company (R129). Thus, moneys that were paid to Rein-

feld's brother-in-law, Holtz, who did not hold stock in his own name, came to him tax paid and Cohen so advised him (R239). Cohen also attended to the payment of taxes on all the profits of the sale and so advised Reinfeld (R190, R205, R206).

Reinfeld's Payment to Rutkin

The payment to Rutkin of $250,000. in 1943 resulted from a series of meetings and conferences which were held starting in December, 1942 (R50). Reinfeld says that those meetings were preceded by threats made by Rutkin. He testified as follows: Late in October or early in November 1942, Rutkin came to his office and started a conversation by saying, "Where is my money?" (R40). When asked what money, Rutkin said that all had made a lot of money, "What about me?" (R41). He then said that he was in debt and that he would require $100,000. When told that it would not be given to him, Rutkin, holding his hand in his pocket, said that he would kill Reinfeld if the money were not given to him within three days and then ran out of the office (R41). Several weeks later, says Reinfeld, Rutkin pushed past Reinfeld's secretary and again threatened Reinfeld if money was not given to him. This time the demand was $150,000. (R43). On his direct examination, Reinfeld said that in reply to the demand, he told Rutkin he would pay him the money (R43). On cross examination he said that when the demand for $150,000. was made, he told Rutkin he would not pay him the money (R164).

Reinfeld at that time was living at the Pierre Hotel. About a week after the second demand, Rutkin called him, apologized for his conduct and asked permission to come to Reinfeld's rooms. They had some drinks and just as Rutkin was leaving, he pulled out a gun and told Reinfeld to get him $200,000. or he would kill him. He then slammed

the door and left (R43). On cross examination Reinfeld testified that Rutkin pulled out a gun as he was leaving and told Reinfeld to get money for him but did not say how much money (R166) although he later said the demand was for $200,000. (R167). Although he was frightened and feared that Rutkin would fulfill his threats, he made no report of the incident to anyone (R167). Several weeks later he received a telephone call from Rutkin who said that he was ill at the Warwick Hotel in New York and started to apologize (R44, R168). Although he was still afraid, he felt sorry for Rutkin and went alone to Rutkin's rooms (R44, R169). He said that Rutkin apologized, said he was in debt and asked for money (R44). No threats were made there. Reinfeld left and returned with $5,000., which he gave to Rutkin. Several hours later he gave him another $5,000. (R44, R170). He did not see Rutkin again until two to four weeks later when he unexpectedly met Rutkin in the basement room of Holtz at a meeting with Zwillman, Stacher and others (R45).

To lend credence to his testimony that he had been threatened, Reinfeld said when Rutkin first threatened him, he became so upset that he called off an appointment which he had to close the purchase of the controlling interest in the White Rock Company (R41). This was late in October or early November, the day of the first demand (R40, R41). The negotiations for that purchase had been going on for several months, with one Sam Pass, acting as a broker (R160, R534). Reinfeld had met Pass through Rutkin (R161). Pass refuted Reinfeld's testimony. He testified at first that he met Reinfeld in the fall of 1943 and started negotiations in September 1943 (R535, R542). The negotiations lasted about six months at the end of which time he said Reinfeld called off the deal, saying that he did so on the advice of his bankers (R536, R537). Pass was not well received by the court. See pages R540, R541, R725. It later developed that nego-

tiations had started in the Fall of 1942 rather than the Fall of 1943, but in any event, the deal was not called off until six months after October, 1942, or some time in the Spring of 1943 (R721, R723, R727). Even the witness, Owen, who was called in rebuttal, said that he introduced Pass to Reinfeld in the latter part of 1942 (R910, R911) and that he worked on the transaction with Reinfeld (R910). Reinfeld, on the other hand, never said that he conferred with Owen and that Pass came to him without introduction (R161). It is noteworthy that the prosecution did not prove through documentary evidence, the date on which the sale was called off.

Reinfeld said that the meeting in the basement room came about when Davis told him that Zwilliman wanted to see him (R45). Rutkin says that he caused the meeting to be held (R699) and that it came about in the following manner: Several days before the meeting, which he fixes as December 4th, he received Exhibit D-11 from Reinfeld (R696). That statement indicates an indebtedness of $81,259.10 and was prepared by Cohen (R695). Rutkin explains the exhibit by saying that he had a 3% interest in the St. Pierre-Miquelon enterprise; that his share, amounting to $100,000, was invested for him in Browne-Vintners with a resulting profit of $164,559.10 (R705, R706). Of the $100,000, only $75,000 was returnable, Reinfeld claiming that he had applied the difference against expenses (R705). Moneys were advanced to Rutkin, which he says he received on account of his interest in Browne Vintners (R698). Rutkin testified that Reinfeld told him that $81,259.10 was the balance which he was then holding for Rutkin and was the amount due him when D-11 was delivered (R696, R697). Rutkin disputed the amount due, claiming that Reinfeld owed him $267,000 (R710). Included among the expenses which Reinfeld charged against him was $30,000 for taxes which

represented taxes paid by Reinfeld and which are hereinafter discussed. In rebuttal Reinfeld denied that he owed the money shown on the statement, that he had given the statement to Rutkin and that he had ever paid the amounts totalling $125,000 shown on the statement as having been paid (R878, R880). He had previously testified, however, that on various occasions he had given moneys to Rutkin, namely $2,000 or $3,000 in 1940 (R37, R38), $10,000 in 1941 (R38), and $10,000 at the Warwick Hotel. He testified that other than the $250,000 and the $60,000 paid in 1936, he had given Rutkin throughout the years starting in 1935, sums aggregating $40,000 (R179, R181). At his examination before trial in the New York case, he testified that he had given Rutkin sums which could have aggregated $200,000 (R182). This testimony corroborates Rutkin's statement that he had received substantial sums of money, as shown in Exhibit D-11.

Meetings were held on a Saturday and the following day. Although Reinfeld testified that he was merely told that Zwillman wanted to see him, he brought Cohen to the meeting which started Saturday morning. There were present, according to Reinfeld, he, his brother Saul, Holtz, Zwillman, Stacher and Rutkin (R45). He held no conversation with Rutkin that morning (R46). Reinfeld testified on the next day of trial (R49) that after a conversation with Zwillman on Saturday morning, Rutkin arose and said he would kill Reinfeld and his family if he did not get the money (R50) and that he made the statements in the presence of all those hereinabove named, except the accountants, who he thinks were asked to leave the room (R51). Rutkin said nothing else (R50). That afternoon a second meeting was held. Reinfeld's testimony concerning the occurrences at that meeting is contradictory. The morning meeting lasted about an hour and it was then suggested that Samuel Kessler, an attorney well known to both sides to the controversy, be called (R60). Zwillman,

Stacher and Rutkin returned that afternoon with Mr. Kessler (R61), with the latter appearing for Zwillman and Stacher. Reinfeld had previously paid an income tax deficiency of $400,000, and had expended about $80,000 for fees and expenses in connection with the settlement of his taxes (R30). Reinfeld had charged half of that sum to Zwillman and Stacher and had withheld from their share $240,000 of the moneys received by him from the sale of Browne-Vintners. Zwillman and Stacher demanded a return of that sum and Reinfeld agreed to pay them $225,000. Reinfeld said that that agreement was made when Mr. Kessler, after hearing both sides, said that the money should be returned (R61). Reinfeld also agreed to pay $138,000 which he says he had held in the $900,000 contingency fund so that the amount he was to pay to Zwillman and Stacher was $358,000 (R31, R204, R215). He then said that after the agreement to pay had been reached, Mr. Kessler turned to him and said, "How about Mr. Rutkin?", whereupon Reinfeld said, "Well, what is his claim?" (R47). He then says that Mr. Kessler said that he should go into another room with Rutkin and give him some money since they had been friends for a long time (R47). He then went into another room and asked Rutkin what he wanted. Rutkin asked for $500,000. Reinfeld said that he had previously demanded $200,000, whereupon Reinfeld agreed to pay $250,000 when Rutkin said he would accept that amount (R47). This meeting was said by him to have occurred on Saturday afternoon (R46).

His testimony on cross examination varied from the above. He said that he agreed to pay the sum of $358,000 to Zwillman and Stacher on Saturday (R221). A few moments before, he said that he had made that agreement on Sunday (R215). Earlier, he had said that the contingency fund was discussed on Sunday (R204) although it is clear from his direct examination that the contingency fund was a partial basis of the settlement made with

Zwillman and Stacher (R31). Whether or not the settlement with the others was made on Saturday and Sunday, it is clear from Reinfeld's testimony that before he went into a room to make a settlement with Rutkin, he had already agreed to pay the others the $358,000 (R221).

Reinfeld further testified as follows: Other claims were made by Zwillman and Stacher. It was their contention that he had profited through the sale to Browne-Vintners of bulk whiskey and that he had used dividends for the purchase of stock on the eventual sale of which he had earned large profits (R192). That matter was discussed with no settlement reached. On the following Monday, he was told that Mr. Kessler wanted to see him and when he arrived there he found Rutkin and Stacher sitting with Mr. Kessler (R227, R255). Mr. Kessler announced that the men were demanding more money, that he then stated he wanted his own attorney, left and went to David Popik, his regular attorney, after which Mr. Popik retained Frederic M. P. Pearse and Max Mehler to appear for Reinfeld (R255, R257). He told Mr. Popik of the previous occurrences and was advised by him to see the prosecutor (R56). He did not tell Mr. Pearse and Mr. Mehler that Rutkin had ever threatened him (R257).

Reinfeld's brother-in-law, Holtz, was the only other witness who testified concerning threats. Neither Samuel nor Sol Reinfeld, brothers of the principal witness, who, Holtz says, were present when the threats were made, gave any testimony (R229). Holtz testified briefly as follows: He had been a partner during the prohibition era and was a stockholder in Browne-Vintners. Some of his stock was held by nominees (R236) and the money that he received from them through Cohen was tax paid (R239). At the meeting of Saturday morning, Rutkin asked the accountants to leave the room and threatened to kill Reinfeld and his family "if I don't get my money" (R231). On

cross examination, he testified that Rutkin made the threats, "if he doesn't get his money that he is claiming" (R244). Rutkin returned that afternoon with the others and caused no trouble or disturbance (R248). Holtz did not object when Rutkin returned the next morning with the others (R249). Some weeks later, while Joseph Reinfeld was in the hospital, Rutkin called and said that he hoped nothing happened to Joe because "his family is going to be responsible for that settlement" (R250).

Rutkin's version of the meetings at Holtz's home and of the final settlement differed from that of Reinfeld's. His testimony was corroborated in a number of respects by the attorneys who appeared in the case. Rutkin's testimony concerning this was as follows: When he received Exhibit D-11 from Reinfeld as above related, *supra*, p. 17, he complained that the balance owing was much greater (R695). He thereupon suggested to Zwillman and Stacher that their accountant look into the case and that is how the meeting came about (R699). The first meeting was attended by the three Reinfelds, Holtz, Cohen, Popik, Goldstein, Rutkin, Stacher and Zwillman (R694). Lentz, whose presence at the trial Rutkin unsuccessfully tried to obtain (R4), was also present (R694). At the first meeting, a claim was raised that the Cointreau Company had not been assigned to Browne-Vintners but was retained by one of Reinfeld's companies (R694). Cointreau, Ltd. was one of the companies in whose favor a release was eventually executed (Exh. D-8, R967). Reinfeld and Rutkin went off to a bar in the room where Reinfeld said that he had made honest mistakes (R699) and then stated that he owed Rutkin about $260,000. (R700). Actually, Rutkin demonstrated that there was $267,000. owing (R710). Mr. Kessler was not present that day but did appear on the following day when the same parties were present, with the exception of Lentz (R700). At that meeting, Kessler

asked Reinfeld what Rutkin was doing there and Reinfeld replied that he had the same claim as Kessler's clients (R700). Some time after Reinfeld had allowed Zwillman and Stacher their claim for moneys withheld by Reinfeld for his personal income taxes, Reinfeld allowed Rutkin the sum of $30,000. which he had charged to Rutkin on the same item (R701). Rutkin did not go into another room with Reinfeld nor did he make any threats (R702).

Rutkin was also present at the subsequent meetings held at Kessler's office (R702). At the final meeting held there, Reinfeld agreed to pay $358,000. to the others, whereupon Rutkin said, "How do I stand. How about me?" (R703). Kessler then said that since Rutkin and Reinfeld had been friends for so long a time, they should go into another room and discuss their differences (R703). When they entered that room, Reinfeld said that Rutkin should have the same amount his brothers had received and because of the payments previously made, there was a balance owing of $250,000. Rutkin protested that Reinfeld had previously named a larger sum. Reinfeld said that was a mistake and offered $250,000., which Rutkin accepted. They came out of the room and Reinfeld announced that Rutkin was to receive $250,000. whereupon they shook hands (R704). Zwillman then asked whether the money was tax paid. Thereupon Reinfeld or Cohen produced a sheet showing that all taxes on the profits made on the sale of Browne-Vintners stock were paid and said "Don't worry about it, it's all tax paid" (R704, R705).

Pearse, Kessler and Mehler all testified. Mr. Pearse, called as a witness by the Government, said he had been retained early in 1943 by Mr. Popik, who had been negotiating with Mr. Kessler the claims made by Zwillman and Stacher (R295, R296). He and his associate, Max Mehler,

had carried on negotiations for several months before a settlement was arrived at. Meetings had been held with Mr. Kessler which were attended by Rutkin (R296), although Rutkin's claims were not discussed. He had been told by Reinfeld of the meetings held on Saturday and Sunday and of Reinfeld's agreement to pay a sum of money to Rutkin. His retainer was to negotiate the additional claims that were made after the conferences in Holtz's home (R298). He was told by Reinfeld that he was not called upon to negotiate as far as Rutkin was concerned but that if the claims were settled, he was to pay Rutkin $250,000 (R298). Reinfeld never told him that he had been threatened or intimidated by Rutkin (R306). The amount that Reinfeld eventually agreed to pay was the same amount that he had agreed upon at the meeting in Holtz's home (R299). He was present when the money was paid in 1943 (R300). Although the following testimony was struck by the Court, we refer to it because of its importance and because we feel that it was erroneously removed. Mr. Pearse testified that in conferences with Cohen he was assured by Cohen "that any money that was paid over to either party was, I don't know what you would call it, capital gains tax or whatnot. In other words it was free and clear" of taxes (R305). We contend that that evidence was admissible in view of all of the testimony related above that Cohen handled all of the details of investments by stockholders and the payment of taxes by them. It will be recalled that both Holtz and Reinfeld testified that they had been assured by Cohen that their moneys were tax paid (R206, R239).

Mr. Kessler, who has been a member of the bar for forty years, and has served as an Assistant United States Attorney, Assistant Prosecutor and United States Commissioner, called by the defense, testified that he attended only one conference at the home of Mr. Holtz and that

took place on a Sunday in December 1942 (R458, R459). He had been requested by Stacher early that morning to attend at Holtz's home (R460). When he arrived with Stacher he found Reinfeld, two or three of his brothers, Holtz, Cohen, Rutkin, Zwillman and Popik present (R459, R460). He was asked by Reinfeld to arbitrate a controversy which had arisen between him on the one hand and Stacher and Zwillman on the other, concerning the latters' dissatisfaction with the amount of money they had received from the liquidation of Browne-Vintners. He asked Reinfeld to identify those present. When Reinfeld turned to Rutkin, he said, "Rutkin is here. He has the same claim as the claims that Stacher and Zwillman have and he says that he didn't get all his money". (R462). Mr. Kessler refused to act as an arbitrator and undertook to represent Stacher and Zwillman whose claims were to be discussed before Rutkin's (R462, R463). The claim for the amount withheld by Reinfeld for taxes was first discussed, the contentions being made on Reinfeld's behalf by Popik and Cohen (R463). After discussion, Reinfeld agreed on a payment on this item (R464). The contingency fund was next discussed as well as a withholding by Reinfeld of moneys that he was obliged to pay to the State of New York for income taxes (R465). Various items of expense were next considered, the amounts to be verified at a later time (R466). The balance of the morning was devoted to a claim that Reinfeld had invested $700,000 in Browne-Vintners with the resulting profit to him, when in fact the moneys should have been borrowed (R467). The result of this investment was to decrease the interest of Stacher and Zwillman in the company (R466). The following week, and as a result of the arrangements made at the Sunday meeting, Cohen brought over records to Mr. Kessler's office (R469). A further meeting was held, with all of the parties, ac-

countants and attorneys present (R469, R470). New contentions were made. In going over the records produced by Cohen, it was discovered that $500,000 additionally invested by Reinfeld came from the profits of a sale made by one of Reinfeld's companies of bulk whiskey to Browne-Vintners (R471). Reinfeld was informed that the claim amounted to about $1,000,000 and that perhaps he should have additional counsel (R473). The meeting was then adjourned and within the next two weeks, Mr. Kessler was informed that Reinfeld was now being represented by Pearse, Mehler and Popik (R473). Mr. Kessler denied that he had met with Reinfeld at his office on the Monday following the Sunday meeting as Reinfeld had testified (R473).

Conferences, always attended by Rutkin, were then held between the attorneys in the presence of their clients and the accountants (R474). At a final meeting held at Mr. Kessler's office, Reinfeld said that he would not pay any more than he had agreed to pay at Holtz's home, whereupon Stacher and Zwillman said that they would not pursue the matter further (R475). Following that statement, Rutkin then said, "Now, what about my claim?" It was at this time and at his office, says Mr. Kessler, that he suggested to Reinfeld that he go into the library with Rutkin where he could probably settle Rutkin's claim without the help of lawyers since he had already heard the discussion of the claims (R476). Reinfeld and Rutkin then entered the library, remained there for about ten or fifteen minutes and when they came out, Reinfeld said that he had settled his differences for $250,000 and that they were shaking hands on it and that the parties thereupon did shake hands (R476). Zwillman then asked if the moneys were tax free. Reinfeld said they were. Cohen also said that all the taxes had been paid and pulled out a sheet which indicated that all capital gains taxes had been paid (R477). There was no request for payment

by cash. A check was requested. Reinfeld said he would pay in cash as soon as he could collect the money (R478, R479). Mr. Kessler testified that the events occurred as above related by him. He said that Rutkin and Reinfeld had not left Holtz's basement room during the Sunday meeting and that he did not tell Reinfeld at Holtz's home to take Rutkin into another room and give him some money.

Mr. Mehler, called by the defense, testified briefly (R625 to R631). He said that he was present at the office conferences above adverted to and that at the last meeting Reinfeld agreed to pay the amount he had previously agreed upon at Holtz's home (R629, R630). When Zwillman and Stacher stated that they would accept the settlement previously arrived at, Rutkin said, "How about me" or "words to that effect"; that Reinfeld and Rutkin then went into another room at Mr. Kessler's suggestion and when they returned Reinfeld said he was going to pay Rutkin $250,000 (R630, R631).

Some time before May 11, 1943, Mr. Popik asked Reinfeld for the money that was to be paid to Rutkin, Stacher and Zwillman (R52, R53). On May 10, 1943, Mr. Popik sent to Mr. Kessler a form of general release which he had prepared and which he said he intended to use in connection with the closing which he was trying to arrange for the next day (Exhibit D-10, R970). On May 11, 1943, Mr. Popik, together with Mr. Pearse and Holtz, came to Mr. Kessler's office with $608,000.00 in cash, which was paid to Zwillman, Stacher and Rutkin (R300, R480). The release, prepared by Mr. Popik, was then executed by the three payees (R480, R967, Exhibit D-8) and was witnessed by the three attorneys. The release runs in favor of Reinfeld, his brothers, Holtz, other relatives, Browne-Vintners Company and Cointreau, Ltd. Neither at the time of the payment, nor at any other time, did Reinfeld

deliver to Rutkin a general release, or any other type of release with respect to the $250,000.00, which Reinfeld paid to Rutkin on May 11, 1943.

Reinfeld's Treatment of Other Stockholders

Kanengiser, Facher, Arnould and Cost or Costy were partners of Reinfeld during the prohibition era and had a financial interest in the net proceeds remaining after liquidation of the partnership. Reinfeld acknowledged that Facher's stock was held in the name of a nominee and so was Kanengiser's (R120). In fact, Reinfeld said that Kanengiser was one of the persons who acquired Rutkin's interest (R194, R195). In addition to their original interests, Facher and Kanengiser each gave Reinfeld sums slightly in excess of $1200 to increase their respective interests to $20,000 each (R358, R420). Both testified that they received none of the proceeds of the sale of the stock although they requested it (R360, R423). Reinfeld's excuse for non-payment was that most of the money had been used for expenses and nothing remained for them (R360, R423). Arnould, too, said that he received none of the proceeds of sale either for himself, or for Costy, who was then deceased (R570, R571).

The New York Litigation

In 1948, Rutkin started suit against Reinfeld in New York for $22,000,000 (R281). That case has not yet been tried (R280). Reinfeld testified that the first time he ever told about the threats was during his examination before trial although he says he did mention the threats to his family before the meeting at Holtz's home (R281). No demands have been made of him by Rutkin since the payment in 1943 except such demands as are set forth in the complaint in the New York suit (R282, R283).

ARGUMENT

POINTS 1 and 2

1. Is money secured by extortion taxable income within the meaning of 26 U. S. C. 22(a)?

2. Is money secured by extortion taxable income within the meaning of 26 U. S. C. 22(a) because the extortioner asserts a patently spurious claim thereto?

By motions for judgment of acquittal (R315, R914, R954), and by exceptions to the charge (R936), trial counsel for petitioner promptly and clearly made known to the trial Court the contention that the income which is the subject of this indictment was not taxable under the decision of this Court in *Commissioner* v. *Wilcox*, 327 U. S. 404. The trial Court ruled that the *Wilcox* case was not applicable and denied the motions (R321, R322, R915, R916, R956). The denial of the motions, and error in the charge on this point, were assigned as error in the Court of Appeals, which affirmed the conviction.

The taxability of the income admittedly received by petitioner was the chief issue at the trial. If the trial Court's rulings on the motions, or its charge, were erroneous in law, reversal must follow.

At the conclusion of the government's direct case, the evidence presented by it in its effort to prove the manner and reason for the payment of $250,000.00, by Reinfeld to Rutkin, was summarized by the trial Court as follows:

> "But here you have uncontroverted and uncontradicted, so far, a situation where the defendant is alleged to have threatened the man with violence and used a gun in the threat, and threatened to kill him and his family, and according to the testimony so far adduced, uncontradicted and uncontroverted

so far, the money was paid over not for any other purpose except to assuage the murderous instincts or threats of the defendant, and that he received the money and that he did not report it and did not pay any income tax on it. As I say, it is only the Government's case so far and I daresay that your associate counsel will very ably introduce evidence to controvert that; but certainly on the situation as it stands now, there is a distinct question for the jury and I shall deny your motion. You may have an exception." (R321-R322)

Under the *Wilcox* case, the existence of a taxable gain is conditioned upon two criteria:

(1) the presence of a bona fide legal or equitable claim to the alleged gain.

(2) absence of an unconditional obligation to repay or return that which would otherwise constitute a gain.

Assuming the trial Court's summary, *supra*, to be accurate, petitioner received money as the result of a criminal tort, without the existence of a bona fide legal or equitable claim thereto. The acts ascribed to him by the trial Court, in its summary, constitute the crime of extortion under the statute law of New Jersey, where the money was paid and received (N. J. S. A. 2:127-4), and under the case law of both New York and New Jersey, as well as many other jurisdictions. The crime is complete when money is secured by threats to do bodily harm, if the recipient has no bona fide legal or equitable claim thereto. *People* v. *Griffin*, 2 Barb. 427; *Loftus* v. *State*, 19 Atl. Reporter 103; *Cutter ads State*, 136 N. J. Law 125; *McMillen* v. *State*, 60 Ind. 216; *State* v. *Hammond*, 180 Ind. 81; 41 Am. Rep. 791; *Mann* v. *State*, 47 Ohio St. 556, 11 L. R. A. 656.

The common meaning of extortion is the same. Extortion is the "act or practice of obtaining anything from a person by illegal use of fear, whether by force, threats

or——". *Webster's New International Dictionary, Second Edition, Unabridged* (1942), cited with approval in *U. S.* v. *Sutter*, 160 F. 2nd 754, 7 Cir., 1947, at page 756.

If, in addition, the petitioner at the time of receipt of the money, was under an unconditional obligation to return or repay the $250,000.00, it did not, under *Wilcox*, represent a taxable gain. The answer to this question is found not in the transcript, but in the law as it properly applies to the facts summarized by the Court. The answer was supplied by this very Court which said:

> "Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law at the very time of payment, creates the obligation to refund it." *Bank of U. S.* v. *Bank of Washington*, 6 Pet. 6, 8 L. Ed. 299, 304.

See also *McKnight* v. *Commissioner of Internal Revenue*, 127 F. 2nd 572, that when monies are unlawfully received, the law immediately and absolutely fixes upon the receiver the duty to account for and to repay the value of what is taken. No action or election by the owner is necessary.

To this very day, one who receives money through extortion is, like an embezzler, under the unqualified obligation to return or repay the same, 48 C. J. 741, Section 294, and cases cited thereunder; *Miller* v. *Eisele*, 111 N. J. Law 268. In New Jersey, where the money was received by petitioner, a person from whom money is extorted may replevy the same as soon as it comes into the hands of the extorter. N. J. S. A. 2:73-1 and 2.[1] *Cf. Commissioner* v. *Wilcox, supra.*

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[1] "If the goods or chattels of any person be taken and wrongfully detained, the sheriff, by a writ of replevin shall cause such goods to be replevied and delivered * * *."

"Any unlawful detention of goods and chattels from their lawful owner or the person entitled by law to the possession thereof, shall be deemed an unlawful taking for the purpose of supporting an action of replevin * * *."

Under the summary of the trial Court set out above, and under applicable statute and case law, petitioner received the $250,000.00, without the existence of a bona fide legal or equitable claim, and under an unconditional obligation to return the same. The income was, therefore, not taxable under the twin criteria outlined by *Wilcox*. The trial Court's refusal to grant petitioner's motion for judgment of acquittal at conclusion of Government's direct case was, therefore, a clear cut error of law for which the Court of Appeals should have reversed.

As opposed to the trial Court's summary of the Government's evidence, to the effect that petitioner had received the $250,000.00, without the existence of any bona fide legal or equitable claim of right, the Court of Appeals sustained the conviction upon the theory that from the evidence the jury would have been justified in concluding that the petitioner had received the money with "a *semblance* of a bona fide claim of right." This finding of the Court of Appeals was predicated upon the testimony of the witness Reinfeld, that the petitioner had asserted a claim to an interest in the stock of the Browne-Vintners Co., Inc. This, despite Reinfeld's testimony that petitioner's asserted claims were, to petitioner's knowledge, without basis in fact. The appropriateness of sustaining a conviction upon a theory directly contrary to that upon which the Government relied for conviction at the trial, and as to which the jury was completely uninstructed, is discussed later in Point IV of this brief.

The *Wilcox* case and *U. S.* v. *Lewis*, 340 U. S. 590, both predicate taxability under Section 22 (a) upon the *existence* of a bona fide legal or equitable claim. There is nothing in the rationable of the *Wilcox* case or *Lewis* case which warrants substitution of "asserted" for "existence." Furthermore, neither the Government, nor the Court of

Appeals, contends that the claim which petitioner asserted was bona fide. We are not here dealing with a bona fide claim which later was learned to be a mistaken one.

Both *Wilcox* and *Lewis* predicate taxability on the bona fides of the existing or asserted claim. In the *Lewis* case, the Court found the income taxable because

> "Respondent had at all times claimed and used the $22,000.00, unconditionally as his own, in *good faith*, though 'mistaken' belief that he was entitled thereto." (*U. S.* v. *Lewis*, 340, 590, 591) (Italics ours.)

In that same case, this Court said:

> "And in Commissioner v. Wilcox, *supra*, we held that receipts from embezzlement did not constitute income, distinguishing North American Oil on the ground that an embezzler asserts no 'bona fide legal or equitable claim.'"

The quotation marks and emphasis which this Court in this last quoted phrase gave to the words "bona fide" legal or equitable claim, are to us conclusive that the existence or assertion of a spurious or baseless claim, as distinguished from a bona fide claim, will not render income taxable under Section 22 (a).

The Court of Appeals has approved the conclusion that extorted funds are taxable if the unlawful demands of the extortioner are accompanied by a spurious claim or demand, asserted in bad faith. We agree with the expression of Judge Hastie in the dissent below, that disapproval is required by the reasoning of this Court in the *Wilcox* and *Lewis* cases.

> "So far as we are advised, no court has gone so far as to decide that the fact that the taxpayer, at the time he received a sum of money asserted a

claim thereto requires tax officials to include that sum in the taxpayer's income for the year he received it, though it was then apparent to any informed person that that claim was wholly unfounded * * *."

"Tax officials are not required to treat as income money received by a taxpayer when under well settled law, his receipt of it has the effect of obligating him unconditionally to pay that money to another." *Commissioner* v. *Turney*, 82 F. 2nd 661, 662.

The Court of Appeals has further distinguished the instant case from *Wilcox* for the reasons set forth in the following excerpt from its opinion.

"* * * there is not the slightest hint in the record that Rutkin ever had or has such obligation. Reinfeld, after agreeing to giving the $250,000.00 to Rutkin, did cause that sum to be turned over to him and took from him a general release. Reinfeld, the owner of the funds, participated in what he designates as their misappropriation by his own conscious acts. Obviously, as a result of that transaction, Rutkin at that time possessed a colorable claim of title to the money. This has never since been challenged. Reinfeld has unmistakably considered the $250,000.00 to be Rutkin's property. He has left Rutkin in undisputed possession of it for the last eight years and has permitted the statute of limitations to expire on whatever right he might have had to reclaim the money."

It is respectfully submitted that the very first sentence of this quotation indicates the point at which the Court of Appeals fell into error. The question of whether or not Rutkin had a definite unconditional obligation to repay or return the funds is not to be found in the record but in the legal principles applicable to the fact conclusions which the jury was obliged to reach in order to convict.

More than 100 years ago, the Supreme Court of the United States said, "Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates obligation to refund it. A notice of intention to recover back the money does not, even in such cases, create the right to recover it back; that results from the illegal exaction of it, * * *." (*Bank of U. S.* v. *Bank of Washington*, 6 Pet. 6, 8 L. Ed. 299, 304). In the accompanying note (starting at p. 299 of the Law Ed.), the following language is particularly pertinent:

> "If one man has obtained money of another through the medium of oppression, * * * extortion * * *, such money is in contemplation of law, money received for the use of the injured party, it is not the money of the wrong-doer, and he has no right to retain it. The law implies a promise from him to return it to the rightful owner."

To the same effect is *McKnight* v. *Commissioner of Internal Revenue, supra,*

That Reinfeld participated in the misappropriation of the $250,000.00 by his conscious acts cannot confer upon petitioner even a colorable claim of title. Both a lender and the victim of a robbery part with possession of money by their conscious act, yet it cannot be suggested that in such instances the money is taxable under Section 22 (a), to the borrower or robber. Only when the conscious delivery of money or personal property is the result of a voluntary act, is any degree of title conveyed. Reinfeld's delivery of the money was conscious, but it was certainly not voluntary. Where a payment has been obtained by extortion or when made upon a wrongful demand, to save the party paying from some great or irreparable mischief or damage, such payment is not voluntary. *Cockle* v. *Maxwell*, 3 Blatchf. 413; *Tutt* v. *Ide*, 13 Blatchf. 249; *Chicago* v.

Northwestern Mutual Life Insurance Co., 218 Ill. 40, 1 L. R. A. (N. S.) 770. In the instant case, Reinfeld's conscious act was involuntarily induced by the desire to avoid the result of the illegal threat. The involuntary delivery is what distinguishes this case from situations in which some degree of colorable title passes to a wrong-doer, as in cases of obtaining money under false pretenses. *Southern Pac. Co. v. Bank of America*, 23 F. 2nd 939.

As illustrated in *Bank of United States* v. *Bank of Washington*, and the accompanying note, *supra*, Reinfeld's failure to dispute petitioner's possession of the money does not alter the unconditional obligation imposed upon the petitioner by law to return or repay the money. That obligation arose at the exact moment the money was wrongfully exacted. No notice of election to recover it back was necessary to create the obligation, and no inaction on the part of Reinfeld could cancel or void the obligation. Had Reinfeld executed a release in favor of the petitioner, at the time the money was paid over, or at some other time thereafter in the year 1943, the situation might be otherwise. The lapse of time cannot make a taxable gain for the calendar year 1943 of that which was not taxable for the calendar year 1943. *McKnight* v. *Commissioner of Internal Revenue*, *supra*.

If from the inaction of Reinfeld and the passage of time, a form of condonation may be implied, as was theorized by the Court of Appeals. The exact point in the elapsed eight years at which this change took place would then determine the incidence of the tax. There is no proof that such condonation and a resultant change in the taxability of the $250,000.00 occurred in the calendar year 1943. It must further be remembered that condonation was never an issue at the trial, and that the jury was entirely uninstructed on this point. This alone would require reversal and the award of a new trial. *Bollenback* v. *United States*, 326 U. S. 607.

By reason of the foregoing, it is petitioner's contention that the income which is the subject of the instant indictment, was not taxable under the doctrine of the *Wilcox* and *Lewis* cases; that, if under any theory, the aforesaid income is taxable, the case did not go to the trial jury upon appropriate instructions as to such theory.

POINTS 3, 4, and 5

3. Did the trial Court err in refusing to grant a motion to direct a judgment of acquittal made at the conclusion of the Government's direct case?

4. May a Court of Appeals properly affirm a conviction upon a new finding of fact, when the trial jury was entirely uninstructed on the law to be applied to such finding?

5. Did the trial Court commit reversible error in charging the jury incorrectly in a specific instruction on a vital issue, and in refusing petitioner's request to give the jury a lucid statement of the relevant legal criteria on that same issue?

The defendant's trial counsel, in making requests to charge to the trial Court, included the following request No. 29, which the Court refused to charge:

> "It is admitted that the capital gains tax on the sale of all the Browne-Vintners stock was paid, and, therefore, if the money which Rutkin received came to him as a result of his interest in Browne-Vintners stock, it was not taxable, he was under no obligation to report it in his income tax return for 1943, and he must be acquitted. Even if you believe Rutkin made threats to Reinfeld and that these threats produced the money, if the money was in payment of Rutkin's interest in the Browne-Vintners stock, he should be acquitted." (R949)

It is submitted, for the reasons following, that the refusal of the Court to make the charge in the language as requested, or the substance of the request in any language, was prejudicial error.

Rutkin in his defense claimed the $250,000.00 payment from Reinfeld as of right as Rutkin's derivative share in the tax paid profits and return of capital in the Browne-Vintners venture. It is conceded that all income taxes on the Browne-Vintners gains had been declared and paid to the Government by nominees and the beneficial owners of stock were not required to pay any further income tax on the mentioned profits.

The Government, while making this concession, nevertheless prosecuted the petitioner on the theory that the monies he received from Reinfeld were Reinfeld's personal funds and did not represent petitioner's derivative share of the Browne-Vintners sale. The Government contended that the funds were paid purely as a result of threats petitioner made to Reinfeld without any semblance of a bona fide claim of right to the monies. In charging the Jury, the trial Court gave instructions which presented a sharp dichotomy: leaving them the choice of acquittal, if they found that petitioner was entitled to the fund as of right and secured the money without threats, or of guilt, if they found that the payment was made as a result of threats. The instructions precluded consideration of an equally justifiable hypothesis for acquittal as set forth in the refused request No. 29, that petitioner was rightfully entitled to the money but enforced payment to him by the means of threats.

The pertinent parts of the Court's charge follow:

> "If that money was extorted and was paid as a result of threat, then it was taxable income and Rutkin was under the duty of reporting that tax." (R930)

> "There is no contention here that the defendant didn't know he got the $250,000; the whole point is whether he got it by extortion or whether he got it properly. If he got it properly the tax was already paid." (R932)

These excerpts contain the only reference in the Court's charge to guide the jury concerning the keystone upon which was balanced the guilt or innocence of petitioner. First: the Court states that if the money was extorted and paid as a result of threats, the petitioner is guilty. Second: the Court states the whole point is whether petitioner got it by extortion or whether he got it properly. The entire instruction leads the Jury to only one result if they find that threats were made. They simply follow the line of reasoning as instructed: (1) threats mean extortion, (2) extortion results in taxable income not reported, (3) petitioner must be found guilty.

The instructions provided by the Court did not permit the Jury to find that petitioner received the money "properly" if they at the same time found that threats were employed. The manner and sequence in which the Court said "extortion or—properly" would definitely have permitted the Jury to believe that "properly" was the alternative to "extortion", and that the petitioner could not have gotten the money properly if he secured the same as a result of threats, regardless of whether or not the money was his tax free derivative share of the proceeds of the sale of Browne-Vintners. The error in such charge is that monies upon which taxes have already been paid are not changed in character to taxable income because the recipient thereof may have employed threats to enforce the collection thereof. The use of threats may properly be characterized as improper under some other criminal statute, but not under this indictment. This error was further aggravated when the Court refused peti-

tioner's request to charge #29, which went to the heart of this very question. Failure to charge request #29, which would have clarified the issue, resulted in substantial prejudicial error.

By an exception to the first quoted portion of the charge, petitioner's trial counsel questioned the accuracy of the Court's charge that extorted money was taxable income (R936). The Court of Appeals did not specifically pass upon the question of the correctness of the trial Court's charge in this respect. We submit that the determination of the correctness of the Court's charge on this point was absolutely necessary to a proper disposition of the cause in the Court of Appeals. The Court of Appeals in bypassing this question, made a new finding of fact to the effect that there is evidence in the record from which the Jury could have concluded that the money was not extorted, and that therefore, the conviction could be sustained.[1] Such a determination by the Court of Appeals was erroneous because the trial Court's instruction to the Jury that extorted money is taxable, was a specific instruction on a vital issue. *Bollenback* v. *U. S., supra.*

Apart from the appropriateness of the action by the Court of Appeals in sustaining a conviction on the basis of new findings of fact, the conviction should have been reversed by the Court of Appeals because the trial Court failed completely to charge the jury as to the legal eventualities present if they should find, as the Court of Appeals did, that the petitioner had received the money with a "sembance of a bona fide legal or equitable claim." Thus, the theory upon which this conviction was affirmed by the Court of Appeals was never presented to the jury. The semblance of a claim of right theory did not appear in this matter until the Court of Appeals rendered its opinion.

1 "So he did receive the money with a 'semblance' of a bona fide claim of right."

Of equal importance with the failure of the trial Court to instruct the jury as to the taxability of the money if the petitioner had received the same with a "semblance of a bona fide legal or equitable claim", was the trial Court's failure to instruct the jury as to the effect of the receipt of the money in the particular circumstances of this case insofar as the element of willfulness requisite for conviction was concerned. Any semblance of a bona fide claim of right which the petitioner could have had to this money could arise only from his having had, in his own mind at least, a right to a derivative share of the proceeds of the sale of the Browne-Vintners Co., Inc. Since the undisputed testimony is that the said monies were tax paid, and that this information was communicated to the petitioner by the attorney for Browne-Vintners, the importance of the failure to charge the jury with respect to the taxability of monies secured with the semblance of a bona fide claim of right, under these conditions and to charge the jury as to the effect of those conditions upon the requisite element of willfulness, was prejudicial error.

The conviction of the petitioner in the trial Court upon the theory that he obtained the money by extortion is error under the doctrine of *Commissioner* v. *Wilcox* and *U. S.* v. *Lewis*. Assuming arguendo that the concept of taxability contained in the findings of the Court of Appeals that petitioner had received the monies with a "semblance of a bona fide claim of right" correctly expresses the law on taxability under the circumstances of this case, then the conviction must be reversed and a new trial granted in order that in such trial the issues may be tried under appropriate instructions to the jury.

In connection with the Court's Charge, in addition to the fact that the jury were not properly instructed, it is respectfully submitted that the final portion of the charge

was highly prejudicial to the petitioner in that it contained a vast amount of irrelevant and immaterial matter which was of a highly inflammatory nature.

We refer to pages R933 to R934 of the record wherein the trial Court charged as follows:

> "But as you do that you must remember the other party to the controversy, the United States of America. Now, the United States of America is not just some far off idea or some distant concept. The United States of America is you and I and about one hundred and forty-five or one hundred and fifty million of our fellow-citizens who are banded together under law, trying to live in peace and comity with ourselves and with the rest of the world; trying desperately to make this America what so many men have suffered and died to make it; the land where justice exists; the land where honesty and decency is represented; where we have selected the government; where we won't be governed by any subgovernment, by any deleterious influences, but where we will be governed under our principles of freedom by the men and women that we select to govern us and that we hope will live up to the sacredness of their oath of service, although you have had a sample here where that is not quite true. But under God that is what we are aiming at. We are aiming at freedom and truth and justice.
>
> And so the people of the United States have their rights too and those rights must be guarded just as jealously for James Rutkin. The Government of the United States doesn't ask you to sacrifice anybody to prove its might. It asks you to do justice. That's all that Rutkin has a right to ask you to do, and that's what the Government of the United States asks you to do. It asks you to remember its rights too, remembering that unpunished crime, undetected crime, are threats to the majesty and dignity of our government. We all of us must do that which is our duty and do it without fear or favor. And so,

> keeping the balance between the two parties to this suit, the United States of America and James Rutkin, do justice between them. And I know of no better way in which to recall to you that which you must do than to recall the words of your oath, 'a true verdict to render according to the evidence, so help you God.' And if you do that, no one may quarrel with your verdict."

It is submitted that the petitioner was on trial for income tax evasion and for no other crime. The entire quoted portion of the Judge's charge tended to infer to the jury that here was the Government's opportunity to mete out punishment by means of this case for other matters not connected with the crime of income tax evasion. The trial Court specifically referred to the fact that "undetected crime" constituted a threat to the majesty and dignity of the Government and that "we won't be governed by any supergovernment" or by any deleterious influences.

Inasmuch as the Government indicted the petitioner for income tax evasion, it cannot be said that the Court was referring to the charges of the indictment under which petitioner was tried, since, if the basis for these charges were undetected, there would have been no trial at all. The Court must have been referring either to the alleged extortion which was not a federal offense, or implying an innuendo that this petitioner was a part of some supergovernment which controlled the Government of the United States. Certainly these facts could have no bearing on the guilt or innocence of the petitioner to the specific charges alleged in the indictment and could only serve to prejudice him in the eyes of the jury.

The remarks of the Court were virtually an instruction to the jury to convict this petitioner, if not for income tax evasion, then for other offenses which the Government suspected but could not detect and punish.

In reviewing the conviction, the question is not whether guilt may be spelled out of the record on the basis of new findings of fact by the Court of Appeals, but whether guilt has been found by the jury, according to the standards appropriate for criminal trials in federal courts and whether the finding of guilt by the jury is based upon instructions which clearly set forth the state of the law on the vital issues concerned. *Bollenback* v. *U. S., supra.*

In the instant case it is impossible to disregard the misdirection of the trial Court by assuming that the jury paid no attention to it, because the jury was also instructed that it must convict if it found that the $250,000.00, was extorted. In charging as he did on this point and in refusing defendant's requested charge No. 29, the trial Court failed in his responsibilities to give the jury a lucid statement of relevant legal criteria. Only upon such a statement can a jury adequately discharge its responsibilities for drawing appropriate conclusions from the testimony. The Court of Appeals sustained the conviction upon its own finding that the defendant received the $250,000.00 with a claim of right, as opposed to the jury's finding it had been extorted. We now have conflicting theories in the trial Court and in the Court of Appeals regarding a charge designed to guide the jury in determining guilt. Yet the conviction was affirmed upon the presumption that the jury was properly guided. Under these circumstances, the assumption must fall.

POINT 6

Did the trial Court properly charge the "false in one, false in all," maxim?

As we have already shown, Reinfeld, Rutkin and Zwillman were in business together during the prohibition era. Reinfeld and Rutkin both so testified and there was no dispute concerning this fact. The Government was permitted to elicit from Rutkin that on another occasion, he had said under oath, that he had not been in business with Zwillman. It was shown that in March, 1945, Rutkin was called to the office of one Bromberger, the then Commissioner of Investigation of the City of New York (R828, R829, R896). Mr. Bromberger was not sitting as a judge but was investigating a retail liquor license (R829). Rutkin was sworn and when asked, during the course of his interrogation, whether he had ever been in business with Zwillman, denied that he had been (R830). At the trial below, he explained that denial by saying that he had told Mr. Bromberger, a "white lie" because he was protecting the liquor license of a friend who was being persecuted by the License Division (R831). Rutkin said that if he realized he was under oath, he never would have denied the association (R831). When the District Attorney asked that the last remark be struck, the Court said that it would permit it to remain "but the Jury will know just exactly what value to place upon it, and what construction to place upon it" (R831). Previously, when an objection was made to another question put to Rutkin, the Court remarked, "If he lies, he is perjuring himself, if he doesn't lie, he is telling the truth. The Jury will judge" (R828).

The Government did not dispute Rutkin's statement given at the trial below that he and Zwillman had once

been partners. It had already established that fact, which of itself was not of any importance. The prior statement was offered solely to discredit Rutkin by showing that at one time he had made an inconsistent statement. At best, the prior statement was barely admissible.

Yet his answer given to Mr. Bromberger became the focal point and the basis of a charge which authorized the jury to reject all the rest of the defendant's testimony. The Court charged the jury as follows (R926):

> "There has been some testimony here about evidence given by witnesses in other courts or in other trials or proceedings antecedent to trial, such testimony having been sworn. I believe that one of the witnesses said 'yes, he told a white lie.' But I know of no dictionary or no classification which would make perjury a white lie; and I don't care whether that perjury was committed to help a friend or not, because if you help a friend by perjury, what do you do to yourself? Who knows? But if you believe that any witness at this trial lied in any respect, then you are free to reject all of the testimony of that witness or any part of it. It doesn't mean, if you believe he lied in one instance, that you must necessarily believe that he lied in all instances, because you must apply to every bit of the testimony your test of truth. So the fact that a witness lied in one respect doesn't, as I say, necessarily mean that he lied all the way through, but it is something for you to consider in determining what credibility you will give to the rest of that person's testimony; and that goes for every witness that appeared before you."

The charge so given was prejudicially erroneous in several respects, each one of which constitutes an adequate reason for reversal and is now separately discussed.

I.

The Court erroneously charged the *falsus in uno, falsus in omnibus* maxim. That maxim, which at one time required the rejection of a witness' testimony arose "when conviction of felony disqualified a witness; and it was based on the reasoning that, since perjury was a felony, the jurors should disregard the testimony of one whom they found to have perjured himself in the trial before them." *Virginian Ry. Co.* v. *Armentrout*, 166 Fed. (2nd) 400 (4th Cir.), 4 A. L. R. (2) 1064.

See also: 3 Wigmore on Evidence (3rd Ed.) Sec. 1009.

The notion that the testimony of one who gives false testimony must of necessity be rejected was finally discarded. The reasons for the change and the form in which the charge may now be given are stated by Prof. Wigmore (Sec. 1010) as follows:

> "There are on principle two reasons which exhibit its unsoundness as a rule of law. (1) It is untrue to human nature. It is not correct that a person who tells a single lie is therefore necessarily lying throughout his testimony, nor that there is any strong probability that he is so lying. The probability is to the contrary. (2) The jury are the part of the tribunal charged with forming a conclusion as to the truth of the testimony offered. They are absolutely free to believe or not to believe a given witness. Once the witness is determined by the judge to be qualified to speak, the belief of the jury in his utterances rests solely with themselves. Hence the judge cannot legally require them to believe or disbelieve any portion of testimony.
>
> Therefore there can not be, for the jury, a 'must' in this matter, but only a 'may'. The correct principle, therefore, can go no farther than to say that the jury *may* disregard the testimony, not that they *must* disregard it; and this is the form of the rule as laid down in the great majority of jurisdictions."

In Jones Commentaries on Evidence (2nd Ed.) it is stated in Section 2473 that:

> "Hence, according to the better reasoning and the weight of authority, the maxim, falsus in uno, falsus in omnibus, is a rule of permission and not mandatory. It is within the discretion of the jury wholly to reject the testimony of a witness whom they believe to have testified falsely in some particulars, or to accept some of his statements and to reject others. The true rule is that the credibility of a witness, who knowingly testifies falsely as to one or more material facts, is wholly a matter for the jury. They may believe or disbelieve his testimony as to other facts according as they deem it worthy or unworthy of belief."

Although the maxim was at one time widely recognized, it has been severely criticized even in its present form and has found disfavor with the courts in recent years. It has been characterized as pernicious and an encumbrance on the administration of justice. See 4 A. L. R. (2nd) 1078 for a summary of the cases involving and criticizing the maxim.

The maxim may not be charged except in a proper case and when stated to the jury is subject to specific limitations.

> "First, the testimony, concerning which the witness has sworn falsely, must relate to a material point in issue. Second, such testimony must have been given by the witness intentionally, and he must have known it to be false. Third, since credibility is a question for the jury, it is error for the judge in his instruction to the jury to single out a particular witness and to direct such cautionary instructions against his testimony, as such a course would tend to convey to the jury the impression that that particular witness is disbelieved by the judge." Jones Commentaries on Evidence, Sec. 2472.

All of the authorities agree that the rule does not apply unless the testimony relates to a material point in issue, is knowingly and intentionally false and is given in the case then being tried.

3 Wigmore on Evidence, Secs. 1014, 1015;
Coleman v. *Public Service Co-ordinated Transport*, 120 N. J. L. 384, 387, 199 Atl. 772, 773;
Larsen v. *Webb*, 332 Mo. 370, 58 S. W. (2nd) 967, 90 A. L. R. 67;
14 R. C. L. p. 736.

There are compelling reasons why all of such elements must concur before the maxim may be charged. The maxim is based on the proposition that when indictable perjury is committed at the trial then in progress, the penalty which may then be visited on the witness and on the party who called him is a permissible rejection of all of the testimony of the witness. Such a drastic measure is not legally permissible under any other circumstances. Even in the case of a prior conviction, the jury are instructed that the fact of conviction may be considered only as affecting the credibility of the witness. *United States* v. *Klass*, 166 F. (2) 373 (3d Cir.). In the latter instance, the jury may not be told that the conviction authorizes them to reject the testimony of the witness. The prior conviction is only a factor to be considered in weighing the testimony of the witness.

Since the penalty for indictable perjury committed at the trial is so severe, all of the elements hereinabove stated must be present in the case before the charge may be given and if present, all of the elements must be charged. If one of the elements is missing or is omitted from the charge, the charge is prejudicially erroneous. Thus, it was held in *Larsen* v. *Webb*, *supra*, that an instruction that if

the jury believe any witness to have sworn falsely "to any fact or circumstance" then they may disregard all or any part of the testimony of such witness, was erroneous in not limiting the charge to testimony as to a *material* matter. In *Addis* v. *Rushmore*, 74 N. J. L. 649, 650, 65 A. 1036 (Ct. of E. & A.), it was said that the jury may apply the maxim only "when convinced that an attempt has been made by a witness to mislead them in some material respect."

The following quotation from *Coleman* v. *Public Service Co-ordinated Transport, supra,* states the rule and cites cases from many jurisdictions in support of our contention:

> "'The cases seem to be in harmony on the point that the application of the rule "*falsus in uno, falsus in omnibus*" can only be properly invoked when the false testimony or statement is wilfully or knowingly or intentionally given or made concerning a material fact in the case; and that an instruction to a jury that if a witness has made a false statement or testified falsely, without qualifying it by wilfully, knowingly, or intentionally relating to a material fact in the case, the jury may reject all or any portion of the testimony given by such witness, is erroneous. *Ducharme* v. *Holyoke Street Railway Co.*, 203 Mass. 384; 89 N. E. Rep. 561; *Chicago and S. L. Railroad Co.* v. *Kline*, 77 Id. 229; *Pauton* v. *People*, 114 Ill. 505; 2 N. E. Rep. 41; *Moett* v. *People*, 85 N. Y. 373; *Childs* v. *State*, 76 Ala. 93; *Prater* v. *State*, 107 Id. 26; *Smith* v. *State*, 75 So. Rep. 627.' *State* v. *Samuels*, 92 N. J. L. 131, 133. See, also, *State* v. *Guida*, 118 Id. 289."

The Court below did not charge any of the essential elements. The jury were instructed that they were free to reject "all of the testimony" of a witness (and as we show below, Rutkin was the witness singled out) simply if they believed "any witness at this trial lied in any respect."

The jury were not told that the maxim could be invoked only if the testimony was knowingly and intentionally false, that such false testimony related to a material fact in issue and was given from the witness stand at the trial. Instead, the Court in substance and effect authorized them to reject all of the testimony of a witness if they believed he had on some occasion spoken falsely on any matter. The authorities above cited clearly condemn as erroneous the charge given by the Court below.

The erroneous charge was particularly damaging in this case. The maxim was charged as an integral part of the charge concerning Rutkin's testimony given before Mr. Bromberger, which Rutkin had stated was a "white lie". Read in context, it is evident that the Court was referring to that testimony when the maxim was charged, or at least a jury would be likely to so understand it. That testimony, characterized by the Court as perjury, was used as a point of reference for the maxim and thus the charge, in the words of the United States Supreme Court, had an "identifying token." *Cf. Shepard* v. *United States*, 290 U. S. 96, 103, 78 L. ed. 196, 201. Hence, when the Court in the next few sentences, told the jury they were at liberty to reject all of the testimony of a witness who had told a lie, the jury could readily consider that they could reject Rutkin's testimony because of the lie he had told Mr. Bromberger. It was improper and erroneous to lead the jury to believe that it could reject all the rest of Rutkin's testimony because of his statement to Mr. Bromberger. By stating, "But if you believe that any witness at this trial lied in any respect," the Court was referring not to testimony given at the trial in the Court below, but to the witness who appeared in that trial regardless of the proceedings in which such testimony was given. Such is the language of the Court and so would the jury be likely to understand it. The effect of the charge was to destroy

Rutkin's entire testimony on erroneous grounds erroneously stated.

Even if the Court had intended a reference to testimony given at the trial, the charge was insufficient in many respects as we have shown and the probabilities of confusion to the jury from the language and context are so likely that the charge must be deemed to be prejudicially erroneous.

Cf. Bihn v. *United States*, 328 U. S. 633, 90 L. ed. 1484;
Shepard v. *United States, supra.*

In *Miller* v. *United States*, 120 Fed. (2nd) 968 (10th Cir.), where the conviction was reversed for error in the charge, the Court said (at p. 972):

> "It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so framed that a jury may not draw the wrong conclusion therefrom."

Even where an instruction is technically correct, if it is so equivocal as to be probably misleading in actual fact, reversal should be ordered. *United States* v. *Bayer*, 156 Fed. (2nd), 964, 967 (2nd Cir.).

The charge complained of was clearly erroneous and prejudicial for the several reasons argued above. Reversal must be ordered so long as "the jury might have been influenced by the erroneous charge." *Bihn* v. *United States, supra.* See also *Kotteakos* v. *United States*, 328 U. S. 750, 90 L. ed. 1557; *Schaerman* v. *United States, supra.*

Exception was taken to the charge. The Court thereupon charged the jury as follows:

> "Counsel has said to me that I told you that if you believe the witness lied in any respect you might disregard all of his testimony. What I had in mind is that if you find that he lied you may accept or reject such testimony as you believe to be false or

true, accept the true and reject the false and if you had any other impression, please correct it to that extent." (R935)

The additional charge not only failed to cure the error but in fact emphasized the erroneous charge which had previously been given. That charge was not withdrawn. The new charge was a substantial reiteration of the maxim, again in erroneous form. The original charge authorized the jury to reject all of Rutkin's testimony. The new charge merely told the jury that they may accept testimony which they believe to be true, giving them in converse form the same choice previously given, namely, to reject or accept such testimony in their discretion.

II.

Even if the instruction had been properly stated, it was error to single out Rutkin when the false in one charge was given. That charge came immediately following the characterization of Rutkin's statement to Mr. Bromberger. It was likely that the jury would understand it was meant to apply to Rutkin even though his name was not specifically mentioned, for no other witness had said that he had told a "white lie". The Court's charge was therefore doubly erroneous. See Jones Commentaries on Evidence, Sec. 2472, page 42, *supra*.

Such singling out by the Court in *Virginian Ry. Co.* v. *Armentrout, supra*, resulted in a reversal of the judgment. That was an action for personal injuries resulting in a verdict for the plaintiff. The only questions of fact in the case arose in connection with the engineer's discharge of his duty as to keeping a proper lookout and using due care in stopping the engine and with respect to all of these matters he was the defendant's principal witness and the only witness who saw the accident. The Court charged the jury as follows:

"You see, as I told you a while ago, if you think that a witness testifies falsely about something you don't need to believe him on anything, so if you believe that Murdock said he sanded the rail, knowing that he did not sand the rail, then that would be a false statement and you would not have to believe anything he said."

In reversing a judgment for the plaintiff, the Appellate Court said:

"It was proper, of course, for the judge to array the evidence and comment upon it; but what the law envisions in this regard is judicial comment fairly explaining to the jury the contentions of the parties with respect to the evidence, not argument by the court in support of contentions. The judge occupies a postion of great influence with the jury in conducting a trial; and while he should not hesitate to exercise the power of comment to clear away false issues and lead the jury into a proper understanding of the facts, he should be careful not to assume the role of counsel or to say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts. * * *

"It was especially damaging to defendant's cause for the trial judge here to charge the falsus in uno falsus in omnibus rule in connection with the conflict of testimony relating to sanding the rails and the position of the engineer in the cab. * * *

"There was no occasion to apply to such testimony the harsh falsus in uno falsus in omnibus rule, which has little or no place in modern jurisprudence. * * *

"We think that the reference to the rule in connection with the testimony of the engineer was most unfortunate in that it tended to discredit the witness upon whom the defendant's entire defense rested, and did so without any real justification that appears of record. Even if it were a proper rule to apply

in some cases, there was no reason to apply it here; and its prejudicial effect was manifestly not removed by the charge given after the taking of defendant's exception. This did no more than instruct the jury that they were to judge as to whether there had been any contradiction in the testimony of a witness and repeat that, upon the finding of a contradiction, they might consider this in determining whether they would believe the witness' testimony.

"It is a reasonable assumption that this prejudicial charge to which exception was taken influenced the jury adversely to defendant and was a contributing factor in causing the jury to return a verdict in an excessive amount."

The charge quoted at page 45, *supra,* was clearly erroneous for the several reasons argued above. Since it was neither withdrawn nor cured by the subsequent remarks of the Court and was extremely prejudicial, it should result in a reversal of the conviction.

POINT 7

Did the trial Court's charge erroneously impair the petitioner's testimony?

The effect of the charge which we have hereinabove discussed was to strip the defendant of his competency to testify and for this additional reason constituted prejudicial error.

A defendant in a criminal case has a right to testify and there is no presumption in favor of or against his truthfulness. *Allison* v. *U. S.*, 160 U. S. 203, 40 L. ed. 395. As the Court said in that case, it is

"* * * for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they (think) it entitled to, as in the instance of other witnesses,

uninfluenced by instructions which might operate to strip him of the competency accorded by the law.

> "We repeat what was said by Mr. Justice SHIRAS, speaking for the Court, in *Hicks* v. *United States*, 150 U. S. 442, 452 (37: 1137, 1141); 'It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices, and perhaps a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is, that "the person charged shall, at his own request, but not otherwise, be a competent witness." The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law.' "

The charge quoted at page 45, *supra*, violated the principles announced in the *Allison* case and was especially damaging to the defendant as we will now show.

There was a conflict between the version of the prosecution and that of the defense as to the reason why the money was paid and the character of the payment. The prosecution contended that the money was paid solely because of threats made to Reinfeld. The defense, contending that the money constituted payment of the defendant's interest as a stockholder in Browne-Vintners Company, produced a number of witnesses in support of that contention. The question of credibility was for the jury's determination, uninfluenced by the Court.

> "It is well established as a basic proposition that in a jury trial questions as to the credibility of witnesses are peculiarly within the province of the jury, and that in general no instruction should be given which is designed to influence the jury as to the credit to be given a particular witness." 90 A. L. R. 74.

The Court called the conflicting testimony specifically to the jury's attention, saying, "that somebody lied and committed perjury is perfectly patent because contradictory stories have been told, and you must see where the truth lies" (R925). Such a charge is not usually given because in almost every case contradictory stories are told. However, having made such a statement, the Court should then have left the matter of credibility strictly to the jury, uninfluenced by any remark which would indicate to the jury which of the witnesses or which side was unworthy of belief. 53 Am. Jur., Sec. 599, p. 474. Instead, it plainly indicated that it was Rutkin, and not Reinfeld, who should be disbelieved.

Only a few moments before the charge complained of was given, the Court told the jury to consider the interest that any of the witnesses might have in the outcome of the trial (R925). It then said:

> "Certainly the defendant Rutkin has a very strong interest in the outcome of this trial. Whether anyone else has or not is for you to determine; and whether that interest in the outcome of this trial would lead the defendant or any other witness to color his testimony or to lie is for you to say * * *" (R925)

Specific attention was next called to Rutkin's statement that he had told a "white lie" when he appeared before Mr. Bromberger. The Court then put its weight behind a devastating comment which drove home to the jury the effect which the Court believed that he could and should

have upon the jury in weighing Rutkin's testimony. Characterizing Rutkin's previous statement as perjury, the Court then said:

> "* * * and I don't care whether that perjury was committed to help a friend or not, because if you help a friend by perjury, what do you do to yourself? Who knows?"

Then came the charge authorizing the jury to reject testimony which they probably and would reasonably understand to be Rutkin. It must be remembered that when Rutkin had said that his statement to Mr. Bromberger was a "white lie," the following occurred in the presence of the jury:

> "The Court: Wait a minute—a white lie?
>
> The Witness: Well, I wasn't under any pressure—
>
> The Court: But you were under the pressure of swearing in the presence of the ever living God to tell the truth."

The portion of the charge quoted above was argumentative and extremely damaging. It was not the statement of a proposition of law which primarily is the function of the Court at that stage of the case. The statement and questions argued and implied that since Rutkin had lied to help a friend, he would readily commit perjury to help himself when he was on trial. Such argument by a trial Court is wholly improper,

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'" *Quercia* v. *United States*, 289 U. S. 466, 77 L. Ed. 1321.

In *Weare* v. *United States*, 1 Fed. (2nd) 617 (8th Cir.), where the conviction was reversed on the ground that the charge was argumentative, the Court said:

> "Under the Constitution one accused of crime is entitled to a determination by a jury of the fact questions involved. The jury can easily be misled by the court. Its members are sensitive to the opinion of the court, and it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The government provides an officer to argue the case to the jury. That is not a part of the court's duty."

In *Malaga* v. *United States*, 57 Fed. (2nd) 822 (1st Cir.), the Court said:

> "Argumentative discussion on the effect of evidence as proof, or the inference to be drawn from the acts of witnesses, or of the respondent in a criminal case, are universally recognized as out of place from the bench."

In *Bihn* v. *United States, supra,* the sole question presented was whether a portion of the charge was reversible error. Essentially the question involved was whether the defendant stole ration coupons from bank files which were accessible to others. In charging the jury the Court posed questions to them: In condemning the charge as erroneous and argumentative, the Court said:

> "* * * The instruction sounds more like comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials of those accused of crime."

The credibility of the defendant was to be determined by the jury without influence by the Court. Nevertheless, the weight of the Court was thrown into the balance so effectively that the jury could do nothing else but disregard the defendant's testimony in view of the Court's argument. The result was to deprive the defendant of his own testimony. The effect produced by the Court's com-

ments and charge was not overcome by the general charge that questions of fact were for the jury's determination. *Quercia* v. *United States, supra.* The following from the *Quercia* opinion can well be applied to the charge below:

> "His (the court's) characterization of the manner and testimony of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence."

See also:

Hickory v. *United States,* 160 U. S. 408, 40 L. ed. 474.

The statement by the Court which attacked the veracity of the defendant by its argumentative questions was damaging as appears from the record. The inflection or tone of voice could readily make it more damaging. *Cf. Bihn* v. *United States, supra.* Combined as it was with a charge which erroneously permitted the jury to disregard the credible evidence of the defendant, the challenged instruction was so prejudicial that the conviction should be reversed.

POINT 8

Did the trial Court err in impugning the testimony of important witnesses for the defense?

Under questioning by the Court, Reinfeld testified that Rutkin had no claim upon him for anything after 1933 and that the payment was made solely because of the threats. He said that Rutkin had absolutely no financial interest in Browne-Vintners (R48, R49) and that Rutkin's consent to the sale of the company had not been asked (R133). On the other hand, Rutkin maintained that the pay-

ment was in settlement of his interest in that company. In support thereof, Joseph and Harry Davis testified that Rutkin was present at the hotel meeting in 1940 and that his consent to the sale was requested by Reinfeld and obtained (R439, R440, R500). Joseph Davis testified that in fact it was Rutkin who asked him to attend the meeting (R439). Their vital testimony, if not impugned by the Court would have been of great value to the defense. It strongly demonstrated Rutkin's financial interest in the company as late as 1940. It refuted Reinfeld's testimony that Rutkin had no such interest and had not been consulted about the sale. If these witnesses were believed by the jury, Reinfeld's credibility would thereby have been seriously impaired and his testimony on a crucial issue would have been seriously damaged.

The credibility of the witnesses should have been left for the jury's determination uninfluenced by the Court. Instead, the Court assailed the defense witnesses and threw its weight into the balance against the defense in the following manner: An improper question was asked of Harry Davis and answered, to which an objection was made (R503). In reply to that objection, the Court said: "Well, I frankly am not impressed by this witness or his brother, and I will not strike it from the record; * * *" (R503). When an exception was taken to the Court's characterization of the witness, the Court said: "I am stating my opinion of this witness * * * from his remarks on the stand" (R504).

The foregoing remarks by the Court were prejudicial to the defense. Similar remarks were considered reversible error in *Cal-Bay Corporation* v. *United States,* 169 Fed. (2nd) 15, 22 (9th Cir.). That case was a condemnation proceeding. A witness had testified to the amount paid by an oil company for an interest in land. The Court said to that witness: "I just can't believe you are telling the truth

on that." The Court said that there could be no doubt of the likely effect that that statement had on the jury, citing *Quercia* v. *United States, supra.*

In the instant case, the Court's quoted remarks could readily have proved controlling on the jury's determination of the credibility of the Davis brothers and on the vital issue of Rutkin's interest in the company. The remarks were so harmful that they should result in a reversal.

POINT 9

Was the charge of the trial Court argumentative and one-sided?

Other portions of the charge which have not been previously adverted to were prejudicial to the defendant and will now be separately considered.

I.

The Court's charge was not given in the judicial language that ordinarily characterizes a charge. It spoke of "this stinking recital", "the skullduggery", the "incredible recital of chicanery". It characterized Rutkin as a scoundrel, saying, "You are not deciding which is the bigger scoundrel, Reinfeld or Rutkin * * * but you are not passing upon respective degrees of scoundrelism between any two people" (R927 to R929).

The Court's indignation was aroused apparently by the conduct of the defendant and others during and after the prohibition era. This may account for the manner and terms in which it charged the jury but does not excuse the error thus committed. *Cf. Starr* v. *United States*, 152 U.S. 614, 626, 38 L. ed. 841, 846, where the Court said:

"* * * The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances."

II.

The Court's charge was one-sided and for this reason was erroneous. The courts have uniformly held that it is an elementary principle that a charge may not be one-sided and that a court may not make statements in favor of or against one side only. When the court states the evidence, it must state it fairly and accurately, setting forth that which is favorable on a point as well as that which is unfavorable. *McGlothan* v. *Pennsylvania R. Co.*, 170 Fed. (2nd) 121 (3rd Cir.); *O'Shaughnessy* v. *United States*, 17 Fed. (2nd) 225 (5th Cir.); *Hurwitz* v. *United States*, 229 Fed. 449 (8th Cir.); *Wallace* v. *United States*, 291 Fed. 972 (6th Cir.), in all of which cases the judgments below were reversed.

The Court did not adhere to the foregoing principles as shown by the following:

1. Reinfeld had testified that when the partnership funds were invested in the Browne-Vintners Company, Rutkin had no interest, since at that time he was overdrawn $35,000. Rutkin had denied this and had received support from Facher's and Kanengiser's testimony. A critical issue was thus raised. The Court summarized Reinfeld's testimony on this important issue but did not state the testimony favorable to Rutkin, omitting all reference to such testimony (R929).

2. After saying that Rutkin had no stock interest in the company, Reinfeld testified that the payment made in 1943 was not for any such interest but because of threats. The Court summarized that testimony and said that it was corroborated by one of the persons present. The so-called corroborative testimony showed that Rutkin's threats, if made, were related to a claim that he had against Reinfeld (R231, R244). When it spoke of the corroboration, the Court should have called to the jury's attention the testimony which indicated that claim. *Cf. Meadows* v. *United States*, 82 Fed. (2nd) 881, 885. The Court also should have made reference to Mr. Kessler's testimony which contradicted the testimony of Reinfeld and showed that Reinfeld had told Mr. Kessler that Rutkin's claim was the same as Zwillman's.

3. There was no secret about the payment of the $250,000. Many people were present and a general release was executed. This important testimony was disparaged by the charge that none of those present "would be inclined to go out and publish it," a statement to which exception was made (R931, R936).

III.

Other remarks of the Court which have no place in a judge's charge and which we contend created prejudice against the defendant presented issues which had nothing to do with the guilt or innocence of the defendant.

> "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view relations of the particular evidence adduced to the particular issues involved." *Bird* v. *United States*, 180 U. S. 356, 45 L. ed. 570.

The Court did not adhere to the principles of the *Bird* case, *supra*. The case was tried at a time when the Korean conflict was raging. Presumably, the jury was composed of salaried individuals whose income taxes may be burdensome. Their only function was to determine the guilt or innocence of the defendant on the facts, uninfluenced by the result of the case on the administration of justice and the fiscal affairs of the Government. Those issues were nevertheless presented to them by the Court, which told them that, "The ordinary salaried individual is expected to pay a tax * * * to carry on every activity of our Government. It is to carry on the expenses of the administration of justice. It is to carry on the expenses of war; * * * and the little fellow who gets a salary has his money taken out of it weekly" (R931). They were told that income tax evasion was chiseling "because what one person who owes a just tax doesn't pay, the next man has to pay and that is not a trifling thing" (R931, R932). It told the jury that the United States, composed of 150,000,000 citizens, "asks you to remember its rights too, remembering that unpunished crime, undetected crime, are threats to the majesty and dignity of our government; and that unpunished crime undermines our government" (R933, R934).

In considering such a charge, the jury, although it might have a reasonable doubt of the defendant's guilt, could be influenced by it not to resolve that doubt in favor of the defendant, fearful that if they gave the defendant the benefit of that doubt they might be parties to an act undermining the government. The charge could also excite resentment, passions and prejudices. Such instructions have been held erroneous. In *Starr* v. *United States*, *supra*, where the Court charged that "if the law has been violated, it is to be vindicated; you are to stand by the nation; you are to say to all people that no man can trample

upon the law wickedly, violently, and ruthlessly; that it must be upheld if it has been violated," the Supreme Court said:

> "These expressions are qualified to some extent by other parts of the charge, which we cannot give at length, but we are constrained to express our disapprobation of this mode of instructing and advising a jury.
>
> "Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same everywhere, and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them." See also *Hickory* v. *United States, supra.*

The charge in the foregoing respects was improper, erroneous and prejudicial to the defendant.

CONCLUSION

We respectfully urge that the judgment below should be reversed for the reasons argued above.

Respectfully submitted,

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